

9-2000-8206-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration in  
the Cross-Section of Unnamed Wetland  
(57-38W) by Jeff Dahlen Without a  
Permit from the Commissioner of  
Natural Resources

FINDINGS OF FACT,  
CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on May 18, 1994 at City Hall, Thief River Falls, Minnesota. The hearing was continued until September 14, 1994 to take the testimony of Jeffrey Dahlen who was unavailable on May 18; and again to September 23, 1994 to take the rebuttal testimony to Mr. Dahlen's testimony presented on September 14. The two continued hearings were conducted by telephone conference call. The record closed on November 1, 1994 upon receipt of the Department's reply memorandum.

The Department of Natural Resources was represented by Donald A. Kannas, Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155-4199. Jeffrey Dahlen was represented by Neil McEwen, Attorney at Law, Northern State Bank Building, P.O. Box 220, Thief River Falls, Minnesota 56601.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Rodney W. Sando, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

### STATEMENT OF ISSUE

1. Whether the Respondent, Jeff Dahlen, placed fill in the bed of unnamed wetland 57-38; and

2. If the Respondent has improperly placed fill in the bed of the wetland, whether the Respondent should be required to remove the fill and restore the property to the condition in which he found it.

#### PARTIAL SUMMARY DISPOSITION

Prior to the hearing in this matter, a Motion for Partial Summary Disposition was made by the Department of Natural Resources resulting in the adoption of the following Findings:

1. Unnamed wetland 57-38W is a protected wetland of the State of Minnesota and within the Department of Natural Resources' regulatory jurisdiction.
2. Jeff Dahlen or his agents altered the cross-section of unnamed wetland 57-38W through drainage activities.
3. Jeff Dahlen's drainage activities were not offset by mitigation measures and did not fall within any statutory exemption to allow such drainage.

Based upon all the proceedings herein, the Administrative Law Judge made the following:

#### FINDINGS OF FACT

1. Unnamed wetland 57-38W is a type 3 wetland of approximately 72 acres in size.
2. Wetland 57-38W is located in the South 1/2 of Section 12 and the North 1/2 of Section 13, Township 153 North, Range 39 West, Star Township, Pennington County, Minnesota. Most of the designated wetland is in Section 13. The Southeast corner of the Southwest 1/4 of Section 12 is now owned by Richard and Judy Miller, Norman Anderson, and the remainder is located on Pennington County administered land. The property now owned by the Millers was previously owned by Lyle Mandt.
3. In or around June of 1981, the previous landowner, Lyle Mandt, dredged fill material out of unnamed wetland 57-38W in order to construct a private ditch to drain the portion of the wetland on his property. Mandt placed the dredged fill material in an "L-shaped" series of mounds along his property line. This dredging activity was conducted without a permit from the DNR, and it was conducted before unnamed wetland 57-38W was officially designated a protected wetland under Minn. Stat. § 103G.005, subd. 15. The unnamed wetland 57-38W was subsequently inventoried and designated as a protected wetland. The exact date of that designation is not contained in the hearing record.

4. By Commissioner's Order dated January 20, 1993, Lyle Mandt was ordered "to restore the waters and bed of the unnamed wetland (57-38W) to the condition which existed prior to the excavation of the drainage ditch and lateral ditches in or about June 1981. . . ." DNR Ex. 4.

5. On August 22, 1993, the Army Corps of Engineers issued a Letter Decision which determined that the drainage work completed by Lyle Mandt was a violation of Section 404 of the Clean Water Act and subsequently issued a directive "to complete the installation of the ditch plug in the manner

described by the Commissioner's Order" and in addition directed the landowner "to construct five breaches in the spoil dike to allow water to flow into the drained wetland basin." The Corps of Engineers' decision further stated that the material removed from the breached areas may not be discharged into the wetland "but may be placed on top of the dike or into the ditch adjacent to breach locations." DNR. Ex. 4, p. 3.

6. The Corps of Engineers issued an after-the-fact permit in September of 1984 to complete the restoration work no later than November 30, 1984. Some, but not all, of the restoration work was completed in 1984 by Lyle Mandt.

7. Jeff Dahlen is a self-employed carpenter and farmer. He is a member of the Red Lake Band of Chippewa Indians. As a Native-American enrolled in the Red Lake Band of Chippewa Indians, Dahlen is an allottee of 320 acres of land located in Beltrami County on the Red Lake Indian Reservation immediately east of unnamed wetland 57-38W. Dahlen acquired his allotment in 1989. As an allottee, Dahlen has the right to farm the 320 acres of land for his personal use.

8. Dahlen lives west of the unnamed wetland 57-38W. His 320 acres is located east of the wetland. During dry periods, the Respondent is able to access his allotted 320 acres by driving a 4-wheel vehicle along the section line between Sections 12 and 13 of Star Township. However, when conditions are wet, he is unable to similarly access his property. In approximately 1992, when conditions were wet, the Respondent constructed a road by leveling out the mounds that had been left on the site by Lyle Mandt. This road bed was constructed on the section line between Sections 12 and 13 through a portion of unnamed wetland 57-38W for a distance of approximately 1/2 mile. He did not introduce additional outside fill to the wetland area in conjunction with his road construction activity.

9. By leveling the dredged spoil material within the wetland, the formerly mounded material has now been pushed into an area of existing cattail growth increasing the "footprint" of the fill. Thus, the Respondent has reduced the area of the wetland.

10. In addition to constructing a road with a bigger "footprint", the Respondent removed a ditch plug which had been previously installed by Lyle Mandt in response to the Restoration Order and replaced the ditch plug with a culvert. He also placed a second culvert on the north side of the previous soil bank which also contributed to drainage of the area. Ex. 2, Photo 2.

11. The Respondent has at no time applied to the DNR for a permit to change or diminish the cross-section of unnamed wetland 57-38W pursuant to Minn. Stat. § 103G.245.

12. The road constructed by the Respondent now prevents the flow of water to a portion of unnamed wetland 57-38W. Reduction of the water flow increases the amount of vegetation affected by the fill material. The road also allows intrusion into the wetland by vehicle traffic which introduces substances such as gas, oil, and dust into the wetland area.

13. Unnamed wetland 57-38W is a type 3 marsh wetland which is usually dry by the fall of the year. Its vegetation consists primarily of cattails and cane grass, which provides habitat for various species of wildlife,

including Blue-winged Teal, Mallards, and Sandhill Cranes. These spoil materials left by Mandt in the area also provided nesting areas for these species. Gordon Forrester is an area wildlife manager in the Thief River Falls DNR office. He has been employed by the Department since 1974. He has observed Mallard pairs, Sandhill Cranes, and Blue-winged Teal in the wetland area.

14. The road construction has impacted and reduced the amount of vegetation in the wetland area. Photographs show both the crown and sideslopes of the road to be devoid of vegetation. DNR Ex. 2, Photos 1 and 2. The sideslopes now contain fresh fill covering old vegetation, thereby reducing wetland food and cover for wildlife.

15. The Respondent has other alternatives available to access his allotted property for farming. He could petition Star Township to condemn a cartway easement around the wetland pursuant to Minn. Stat. § 164.08, subd. 1. He could also negotiate an easement around the wetland. Certainly, during periods, he can easily access his property along the section line between Sections 12 and 13 as he has done previously.

16. On February 19, 1993, the Commissioner of Natural Resources issued a Restoration Order requiring Dahlen to restore the waters and bed of unnamed wetland 57-38W to the condition which existed prior to the removal of the drainage ditch plug and the leveling of the ditch spoil material in the summer of 1992. This Restoration Order required the Respondent to replace the earth plug within the ditch immediately down stream and west of the wetland. It provided that the plug must be at least 50 feet in length with sufficient width to fill the ditch to adjacent natural ground elevations. It required the fill material of the ditch plug to consist of impermeable clay. It provided that the upstream and downstream faces of the plug must have a slope no steeper than three horizontal to one vertical (3:1) and must be seeded or riprapped to prevent the erosion. DNR Ex. 4, pg. 6.

17. The Restoration Order proposed two alternatives to restore the leveling of the ditch spoil material. One option would be to dredge soil material which was pushed into the wetland during leveling to be removed from the wetland and piled as spoil, thus restoring the dredge spoil material to same location and cross-section as it was before the leveling. The second option would be to construct five breaches in the leveled spoil material to allow the free flow of water within the wetland basin. These breach sites would be located at the junction of the north-south and east-west legs of the ditch (Southeast corner of the Southwest 1/4 of Section 12) and in each of the legs at a distance of approximately 250 feet and 500 feet from the junction point. The breaches would be 40 feet wide and excavated to the elevation of the wetland basin bottom. This option would also require the material to be removed from the breached areas and pushed into the ditch adjacent to the breach location. It also provided that the culvert located in the junction

point (Southeast of the Southwest 1/4 of Section 12) shall be removed. DNR 1  
pg. 6-7.

18. The Restoration Order also required the Respondent to notify the area hydrologist at Bemidji, Minnesota prior to the undertaking of the Restoration Order and to notify the DNR area hydrologist within five days after completion of restoration. It also required the Respondent to pay field inspection fees of \$232.12 and refrain from future violations of Minn. Stat. § 103G. From this Restoration Order, the Respondent filed a timely appeal demanding a hearing.



19. On April 6, 1994, an Amended Notice and Order for Hearing was issued by Rodney W. Sando, Commissioner, Minnesota Department of Natural Resources, setting a public hearing this matter on May 18, 1994 at Thief River Falls, Minnesota. The Notice was served by mail upon Respondent and his counsel and mailing list which included the U.S. Corps of Engineers, the Commissioner of the Minnesota Pollution Control Agency, the Chairperson the Environmental Quality Board, the Pennington County Soil and Water Conservation District, and other interested persons. Jurisdictional Ex. A.

20. On April 13 and April 20, 1994, the Amended Notice and Order for Hearing was published in the Thief River Falls Times. Jurisdictional Ex. B and C.

21. On April 25, 1994, the Amended Notice and Order for Hearing was published in the EQB. Monitor at Vol. 18 n.19. Jurisdictional Ex. D.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Commissioner of Natural Resources duly acquired and jurisdiction in this matter.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedure requirements of law or rule have been fulfilled, and therefore, the matter is properly before the Administrative Law Judge.

3. At all times relevant to this matter, unnamed wetland 57-38W was and is a protected public water of the State of Minnesota pursuant to Minn. Stat. § 103G.005, subds. 15 and 18.

4. Minn. Stat. § 103G.245, subd. 1(2), requires a public waters work permit to change or diminish the course, current, or cross-section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters. Jeff Dahlen, or agents at his direction, have altered the cross-section of unnamed wetland 57-38W through drainage activities by removing an earthen plug and replacing it with a culvert thereby draining the wetland in violation of Minn. Stat. § 103G.245, subd. 1(2).

5. Minn. Stat. § 103G.221 generally prohibits the drainage of public waters wetlands unless they are replaced by wetlands that will have equal or greater or value. The Respondent's drainage activities were not offset by a

mitigation measures and did not fall within any statutory exemption to allow such drainage as provided in Minn. Stat. § 103G.221 to 103G.235.

6. Minn. Stat. § 103.245, subd. 1(2) requires a public waters work permit to change or diminish the course, current, or cross-section of public waters, entirely or particularly within the state by any means, including filling, excavating or replacing of materials in or on the beds of public waters. The preponderance of the evidence establishes that Jeff Dahlen, or agents at his direction, leveled ditch spoil material in unnamed wetland 57-38W and in so doing changed the course, current or cross-section of public waters without permit in violation of Minn. Stat. § 103G.245, subd. 1(2).

7. Minn. Rules, pt. 6115.1090, subp. 3.F prohibits the placement of material into protected waters in order to construct a roadway or pathway, or create or improve land access from peripheral shorelands to islands, or to facilitate land transportation across the waters unless the project is proposed for public purposes. The leveling activity of the Respondent was for the purpose of constructing a private road across a wetland. A permit for such road cannot be issued as a result of Minn. Rules, pt. 6115.0190, subp. 3.F.

7. The Commissioner of Natural Resources is authorized by Minn. Stat. 103G.251 to order a party to restore the public waters, or beds thereof, to the condition existing before the nonpermitted activities took place.

8. The removal of the ditch plug which caused drainage to the wetland and the leveling of soil material into the beds of the wetland for the purpose of creating an access road has diminished the resource value of the wetland to the public.

9. The Respondent has at no time applied to the Commissioner of Natural Resources to change or diminish the cross-section of wetland pursuant to Minn. Stat. § 103G.245.

10. The restoration proposed by the Commissioner's Order dated February 19, 1993, is reasonable and practical in that it will, to the fullest extent possible, restore the public waters or beds thereof to the conditions existing before the nonpermitted activities took place and is in the public interest.

11. Any Findings which might properly be termed Conclusions, and any Conclusions which might properly be termed Findings, are hereby adopted as such.

12. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, reasons contained in the Memorandum are adopted and incorporated herein as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED: That the Commissioner's Restoration Order dated February 19, 1993, be AFFIRMED without material modification.

Dated this 30th day of November, 1994.

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PHYLLIS A. REHA  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to send its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped (3 tapes)

### MEMORANDUM

#### Statutory and Regulatory Framework

Unnamed wetland 57-38W is a wetland of the State of Minnesota as it is type 3 wetland as defined in Minn. Stat. § 103G.005, subd. 5 and is over 10 acres in area. It is listed as a wetland in the inventory of protected waters and wetlands within Pennington County. Despite its designation, the Respondent continues to argue that the portion of the wetland in the Southeast corner of the Southwest 1/4 of Section 12 is a separate wetland of under 10 acres in area and in an unincorporated area and is not, therefore, under the jurisdiction of the Commissioner. Respondent argues that because the wetland was not officially designated a public wetland at the time Lyle Mandt constructed a ditch separating the wetland into two parts, it was improperly inventoried and improperly designated as a public wetland.

A wetland's size is all the area within its boundaries, which is delineated by its ordinary high water level, which is that point where the natural vegetation changes from predominately aquatic to predominately terrestrial. Minn. Stat. § 103G.005, subd. 14. Wetlands are dynamic. The transitional line will move in over a series of dry years, and out during a wet cycle. The wet cycle boundary is the legally correct one to use in computing wetland size. Through field inspection, the DNR determined that wetland 57-38W was type 3 wetland as it met the definition of type 3 wetland as described in U.S. Fish and Wildlife Services Circular No. 39 (1971 ed). Minn. Stat. § 103G.005, subd. 18. Subsequently, it was designated a wetland pursuant to the waters inventory and classification procedures of Minn. Stat. § 103G.005, subd. 15.

The drainage activities Lyle Mandt conducted in 1981 were done without a permit from the Department of Natural Resources. Even though the wetland had not been inventoried at that date, it still met the definition of a public waters wetland under the statute in effect at that time. In fact, Mandt was ordered to restore the wetland to its original character prior to the activities of the Respondent. The Respondent cannot "piggy-back" on the improper alterations conducted by the previous land owners.

The Respondent cites Department of Natural Resources v. Mahnomen County Hearings Unit, 407 N.W.2d 434 (Minn. Ct. App. 1987) for authority that it can now challenge the designation of the portion of unnamed wetland 57-38W as a public water wetland pursuant to the inventory process. The Respondent's reliance on this case is misplaced. The Department of Natural Resources v. Mahnomen County Hearings Unit case was an appeal by the DNR of the Mahnomen County Hearings Unit refusal to accept the DNR's recommendations in ten of t

117 water resources reviewed by the Hearings Unit. The DNR argued that the Hearings Unit failed to designate several of the areas as wetlands because they had been unlawfully drained and farmed and did not resemble other wetlands. The DNR further argued that the wetland designation should be based on the former conditions of the wetlands determined through an examination of aerial photo history and other evidence. The Hearings Unit decided that the DNR's position required a retroactive application of the law and declined to apply it. The Court held that it was proper for the County Hearings Unit to refuse to evaluate proposed wetlands based on their former conditions and to evaluate those proposed wetlands based on their condition at time of hearing subsequent to draining. The Mahnomen County case was based upon the statutory procedure in the inventory process for contesting it at the time the wetlands in question were inventoried as public waters wetland. There was no similar challenge to the designation of unnamed wetland 57-38W at the time of the inventory process. Thus, as a matter of law, unnamed wetland 57-38W, as described in the inventory process, is a public waters wetland within Pennington County. It was too late for the Respondent to challenge its designation. Nor did the previous land owner, Lyle Mandt, challenge its designation.

Minn. Stat. § 103G.245, subd. 1(2), provides that a person must have a public waters work permit to:

- (2) change or diminish the course, current, or cross-section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters.

It is undisputed, and it has already been determined by a district court in a criminal proceeding, that the Respondent, through his own acts, did cause to be removed in the summer of 1992 the drainage ditch plug previously installed by Lyle Mandt in unnamed wetland 57-38W, thereby changing and diminishing the cross-section of the wetland by draining the waters. It was also determined that Respondent caused the leveling of the dredged spoil within the wetland, further reducing the area of the wetland. It has further been determined that the Respondent has at no time applied to the Commissioner of Natural Resources for a permit to change or diminish the cross-section of the wetland pursuant to Minn. Stat. § 103G.245.

The Respondent continues to acknowledge that he constructed a road using fill that had been left in mounds on the site by the prior owner of the property, but denies that the fill now covers a larger "footprint" than it had previously. The preponderance of the evidence indicates otherwise. The area wildlife manager in Thief River Falls was involved in the prior fill violation by Lyle Mandt that occurred prior to the time Respondent came upon the scene. As a result, he observed the fill as it existed at that time. He also observed the fill as it exists now. Mr. Forrester testified that the fill now covers a larger footprint than it had previously. Dan Thul is an area hydrologist for

the DNR. He has also observed the fill after the work by the Respondent and has photographed the area. These photographs are in evidence as DNR Ex. 2 and 3. Based upon Mr. Thul's observation of the fill and photographs, he testified that it is clear that the formerly mounded fill has now been pushed into an area of existing cattail growth thereby increasing the footprint of the fill. Mr. Forrester testified that the fill had been left in



mounds by the previous land owner and had remained undisturbed for approximately ten years. As a result, the area became vegetated both on the crown and on the sideslopes. His testimony and the photographs now show both the crown and sideslopes to be devoid of vegetation. The fact that the sideslopes now contain fresh fill covering the old vegetation indicates that the footprint of the fill has expanded and impacted the vegetation growth. Administrative Law Judge has accorded the testimony of Mr. Forrester and Mr. Thul significant credibility and weight..

Furthermore, Minn. Rules, pt. 6115.0190, subp. 3.F., prohibits the placement of fill material into protected waters.

- F. to construct a roadway or pathway, or create or improve land access from peripheral shorelands to islands or to facilitate land transportation across the waters. . . .

The Respondent testified that he needed the road to access his allotted property to the east of the wetland. There was no testimony that there was anything public in nature about the road, so it is prohibited pursuant to Minn. Rules, pt. 6115.0190, subp. 3.F.

Although it is not necessary to arrive at the issue of reasonable and prudent alternatives in this case, there was no evidence that crossing the wetland would be the only possible access to the Respondent's land. He might be able to negotiate for an easement around the wetland, or to petition Star Township to condemn a cartway easement around the wetland pursuant to Minn. Stat. § 164.08, subd. 2.

### Conclusion

The Commissioner's Restoration Order dated February 19, 1993, provides detailed proposal for the restoration of the wetland area. It is similar to the restoration required by the previous land owner, Lyle Mandt. It requires the Respondent to replace the earthen plug within the ditch immediately downstream (west) of the wetland and it gives the Respondent the option of either removing the dredged spoil material from the site to restore the dredged spoil material to the same location and cross-section as was before the leveling occurred; or to construct five breaches in the leveled spoil material to allow the free flow water within the wetland basin. There was no testimony or evidence offered to show that the proposal by the Commissioner was not reasonable or practical or in the public interest. Thus, it is the recommendation of the Administrative Law Judge that the Commissioner's Order be affirmed without material modification pursuant to Minn. Stat. § 103G.311. The applicant must pay costs up to \$750 as provided in Minn. Stat. § 103G.311, subd. 7.

PAR